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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

JAMES A. TURPIN,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security
Administration,

Defendant.

Case No. 2:16-cv-01695-RFB-PAL

ORDER

I. INTRODUCTION

This case involves judicial review of administrative action by the Commissioner of Social Security determining that Plaintiff James A. Turpin's disability has ended under Section 223(f) of the Social Security Act. The Court has considered Plaintiff's motion for reversal, the Commissioner's cross-motion to affirm, and the Commissioner's response to Plaintiff's motion. ECF Nos. 18, 21, 23. For the reasons discussed below, the Court grants Plaintiff's motion and remands this matter to Defendant Nancy A. Berryhill, Acting Commissioner of Social Security, for a reinstatement of benefits.

II. BACKGROUND

Plaintiff completed an application for disability insurance benefits on January 31, 2007. AR 154–56. On October 25, 2007, Plaintiff was found disabled as of December 15, 2006. AR 10.

On October 22, 2013, the Commissioner determined that Plaintiff's disability had ceased as of October 2013. AR 41–42. Plaintiff requested reconsideration of the cessation determination

1 on December 15, 2013, and again on December 31, 2013. AR 51, 53. A hearing was scheduled
2 for April 16, 2014 at the Las Vegas Disability Determination Office and Plaintiff failed to appear.
3 AR 65, 71. The Disability Hearing Officer found that Plaintiff was not disabled on April 25, 2014
4 and the Commissioner denied reconsideration on February 24, 2014. AR 74–79; 80–83.

5 Plaintiff requested a de novo hearing before an Administrative Law Judge on July 28, 2014.
6 AR 89, 91–92, 94. On December 22, 2014, ALJ Norman Bennett found that good cause existed
7 to excuse Plaintiff’s late request for hearing. AR 100.

8 On April 16, 2015, Plaintiff appeared for a scheduled hearing before ALJ Christopher R.
9 Daniels. AR 35–40. The ALJ postponed the hearing for a psychological consultative examination.
10 AR 39. On November 10, 2015, Plaintiff appeared for the rescheduled hearing. AR 25–34.

11 The ALJ published an unfavorable decision on December 28, 2015. AR 7–24. The ALJ
12 followed the eight-step sequential evaluation process for a determination of continued disability
13 set forth at 20 C.F.R. § 404.1594. At step one, the ALJ found that Plaintiff had not engaged in
14 substantial gainful activity through October 1, 2013, the date Plaintiff’s benefits were terminated.
15 AR 12. At step two, the ALJ found that Plaintiff’s impairments do not meet or medically equal a
16 listed impairment. AR 12–13. Regarding the Paragraph B criteria, the ALJ found that Plaintiff
17 has mild restrictions in activities of daily living, moderate difficulties in social functioning, and
18 moderate difficulties with concentration, persistence or pace. AR 12. Regarding the Paragraph C
19 criteria, the ALJ found that Plaintiff has experienced one to two episodes of decompensation, each
20 of extended duration. AR 12.

21 At steps three and four, the ALJ found that, as of October 1, 2013, Plaintiff has experienced
22 a decrease in the medical severity of his impairments and that these improvements are related to
23 his ability to work. AR 13, 17. The analysis therefore proceeded to step six, where the ALJ
24 determined that Plaintiff’s current impairments in combination are severe. AR 17. At step seven,
25 the ALJ found that Plaintiff has no past relevant work and that, as of October 1, 2013, Plaintiff has
26 the residual functional capacity (“RFC”) to perform a full range of work at all exertional levels
27 with the following non-exertional limitations: he is able to perform unskilled work; he is able to
28 interact occasionally with coworkers and supervisors, but is unable to interact with the general

1 public; and he is able to adapt to routine work changes. AR 13–17. At the last step, the ALJ
2 determined that Plaintiff can perform a significant number of jobs in the national economy,
3 including occupations such as kitchen helper, hand packer, and cleaner/janitor. AR 17–18. The
4 ALJ concluded that Plaintiff’s disability ended as of October 1, 2013 and that he has not become
5 disabled again. AR 18.

6 Plaintiff requested that the Appeals Council review the decision on February 26, 2016. AR
7 5–6. The Appeals Council denied the request for review on May 16, 2016. AR 1–3.

9 **III. LEGAL STANDARD**

10 42 U.S.C. § 405(g) provides for judicial review of the Commissioner’s disability
11 determinations and authorizes district courts to enter “a judgment affirming, modifying, or
12 reversing the decision of the Commissioner of Social Security, with or without remanding the
13 cause for a rehearing.” In undertaking that review, an ALJ’s “disability determination should be
14 upheld unless it contains legal error or is not supported by substantial evidence.” Garrison v.
15 Colvin, 759 F.3d 995, 1009 (9th Cir. 2014) (citation omitted). “Substantial evidence means more
16 than a mere scintilla, but less than a preponderance; it is such relevant evidence as a reasonable
17 person might accept as adequate to support a conclusion.” Id. (quoting Lingenfelter v. Astrue, 504
18 F.3d 1028, 1035 (9th Cir. 2007)) (quotation marks omitted).

19 “If the evidence can reasonably support either affirming or reversing a decision, [a
20 reviewing court] may not substitute [its] judgment for that of the Commissioner.” Lingenfelter,
21 504 F.3d at 1035. Nevertheless, the Court may not simply affirm by selecting a subset of the
22 evidence supporting the ALJ’s conclusion, nor can the Court affirm on a ground on which the ALJ
23 did not rely. Garrison, 759 F.3d at 1009–10. Rather, the Court must “review the administrative
24 record as a whole, weighing both the evidence that supports and that which detracts from the ALJ’s
25 conclusion,” to determine whether that conclusion is supported by substantial evidence. Andrews
26 v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995).

27 A claimant receiving disability benefits from Social Security is no longer entitled to
28 benefits when substantial evidence demonstrates medical improvement such that the claimant has

1 become able to engage in substantial gainful activity. Attmore v. Colvin, 827 F.3d 872, 873 (9th
2 Cir. 2016). The ALJ determines whether there has been medical improvement by “compar[ing]
3 the current medical severity of the claimant’s impairment to the medical severity of the impairment
4 at the time of the most recent favorable medical decision that the claimant was disabled or
5 continued to be disabled.” Id. (quoting 20 C.F.R. § 404.1594(b)(7)) (internal quotation marks and
6 alterations omitted). The Social Security Act has established an eight-step sequential evaluation
7 procedure for determining Social Security disability claims. See 20 C.F.R. § 404.1594. Here, the
8 ALJ resolved Plaintiff’s claim at step eight with a determination that Plaintiff could perform jobs
9 available in the national economy given his RFC as of October 1, 2013.

11 **IV. DISCUSSION**

12 **A. Failure To Establish Appropriate Baseline For Comparison**

13 Plaintiff first argues that the ALJ erred at step three of the analysis, which requires the ALJ
14 to determine whether medical improvement has occurred. Plaintiff argues that the ALJ makes no
15 findings related to the Commissioner’s November 11, 2007 determination that Plaintiff was
16 eligible for benefits. Without a point of comparison, Plaintiff argues, the ALJ could not
17 appropriately conduct the comparative analysis required by 20 C.F.R. § 404.1594(b)(1).

18 Where a claimant is found disabled in one decision and, in a later decision, found to be
19 medically improved, the “comparison is straightforward.” Attmore, 827 F.3d at 876. “[T]he most
20 recent favorable medical decision is an earlier decision, and the severity of the claimant’s
21 impairment at the time of that decision provides the relevant baseline for comparison.” Id. (internal
22 quotation marks omitted). “In other words, the relevant baseline normally is the medical evidence
23 underlying the ALJ’s most recent disability determination.” Id. This medical improvement
24 standard was enacted by Congress “as a safeguard against the arbitrary termination of benefits.”
25 Id.

26 The ALJ did not undergo a comparative analysis because the ALJ failed to identify a
27 reference point substantiated by the record. The ALJ summarily stated Plaintiff’s medically
28 determinable impairments and RFC at the time of the favorable medical decision dated November

1 11, 2007. The ALJ did not cite to the medical record in making these statements. Upon reviewing
2 the record, the Court finds that the ALJ's statements do not track the agency's medical assessment
3 by Craig A. Smith, M.D., dated October 25, 2007, which the Commissioner identifies as the clear
4 basis of the November 11, 2007 reconsideration determination. See AR 301-16; ECF No. 21 at
5 2. Dr. Smith concluded that Plaintiff had bipolar disorder and a personality disorder and that
6 Plaintiff was not able to maintain concentration, persistence, or pace on a competitive basis. AR
7 302. In contrast, the ALJ stated that at the time of the favorable medical decision, Plaintiff had
8 affective disorder, a history of alcohol abuse, and probable personality disorder and stated that
9 Plaintiff had the RFC "to understand, remember and carry out simple instructions, but with
10 occasional interruptions of thought processes; he had significant difficulty maintaining appropriate
11 workplace relationships; and difficulty maintaining employment secondary to poorly controlled
12 mood disorder symptoms." AR 12. There is no record of the actual favorable medical decision
13 dated November 11, 2007 with corresponding analysis.

14 To the extent such records are not available, the ALJ should have conducted the initial
15 disability analysis anew based on medical evidence of Plaintiff's condition as of 2007 to properly
16 compare Plaintiff's past RFC to his current RFC. Absent either (1) a record outlining a prior
17 disability analysis for Plaintiff's 2007 favorable medical decision or (2) a renewed analysis of
18 Plaintiff's 2007 RFC supported by substantial medical evidence, the ALJ lacked a viable reference
19 point to properly conduct step three of the analysis. Without a viable and identified reference point
20 for comparison, the Court finds that the ALJ necessarily could not find and thus failed to find
21 medical improvement supported by substantial evidence.

22 Finally, as noted, the ALJ's recitation of Plaintiff's condition as of the award of benefits in
23 2007 was inconsistent with and not supported by the most relevant medical diagnosis at the time,
24 which was that of Dr. Smith. Thus, even the ALJ's attempt to recapture the nature and extent of
25 Plaintiff's impairment at the time benefits were awarded was flawed and cannot support the later
26 decision to terminated benefits.

27 **B. Improper Reliance On Failure to Comply**

28 Plaintiff argues that mental impairments are often undertreated and that the ALJ erred in

1 his reliance on Plaintiff's failure to comply with treatment. AR 11. The ALJ referenced Plaintiff's
2 noncompliance with treatment recommendations frequently throughout his opinion. AR 13, 14,
3 15, 16. The ALJ noted that he considered Plaintiff's noncompliance to be a credibility factor rather
4 than a basis for his decision. AR 14.

5 The ALJ improperly relied upon Plaintiff's noncompliance as relevant to Plaintiff's
6 credibility. In cases where a claimant complains of disabling pain, failure to seek treatment or
7 comply with a treatment plan "may be probative of credibility, because a person's normal reaction
8 is to seek relief from pain, and because modern medicine is often successful in providing some
9 relief." Orn v. Astrue, 495 F.3d 625, 638 (9th Cir. 2007). "But in the case of impairments where
10 the stimulus to seek relief is less pronounced, and where medical treatment is very unlikely to be
11 successful, the approach to credibility makes little sense." Id.

12 Plaintiff has a long history of bipolar disorder. He testified that his medications are not
13 helpful and in fact increase his anxiety. AR 30; see also AR 253 (where Plaintiff reported taking
14 his medications "faithfully, as directed, but feels they are providing no benefit"). Throughout the
15 medical record, Plaintiff expresses a fear of taking medications, a dislike of doctors, and a
16 resistance to psychiatric care. E.g., AR 340, 365. Noncompliance with treatment is entirely
17 consistent with Plaintiff's diagnosis and alleged symptoms. See Nguyen v. Chater, 100 F.3d 1462,
18 1465 (9th Cir. 1996) ("[A]ppellant may have failed to seek psychiatric treatment for his mental
19 condition, but it is a questionable practice to chastise one with a mental impairment for the exercise
20 of poor judgment in seeking rehabilitation." (citation omitted)). Given Plaintiff's self-described
21 stress, anxiety, and discomfort around other people as a result of his bipolar disorder, as well as
22 his statements that medication has not helped his symptoms, the ALJ erred in using evidence of
23 noncompliance with prescribed treatment and failure to seek additional mental health treatment to
24 discredit Plaintiff.

25 To the extent the ALJ suggested throughout the decision that he based his decision at least
26 in part on Plaintiff's noncompliance, the ALJ may not do so without determining that Plaintiff's
27 impairments preclude him from engaging in substantial gainful activity and that prescribed
28 treatment would be clearly expected to restore Plaintiff's capacity to engage in substantial gainful

1 activity. SSR 82-59. The ALJ made no such findings.

2 **C. Little Weight Given To VA rating**

3 Plaintiff argues that the ALJ erred in giving little weight to the VA's finding that Plaintiff
4 is disabled. On July 7, 2007, the Department of Veterans Affairs ("VA") granted Plaintiff's claim
5 for entitlement to nonservice-connected pension, finding that Plaintiff was unable to work due to
6 bipolar disorder and personality disorder. AR 173-74.

7 Due to "the marked similarity between these two federal disability programs," "an ALJ
8 must ordinarily give great weight to a VA determination of disability." McCartey v. Massanari,
9 298 F.3d 1072, 1076 (9th Cir. 2002). Though the disability criteria are not identical, "[t]he VA
10 criteria for evaluating disability are very specific and translate easily into SSA's disability
11 framework." Id. Thus, the ALJ must give "persuasive, specific, valid reason . . . that are supported
12 by the record" for giving less weight to a VA disability rating. Id.

13 The ALJ provided two reasons for giving the VA's disability rating little weight: (1) little
14 evidence of treatment since 2007 and (2) poor compliance with treatment and medications. For
15 the reasons discussed above, Plaintiff's failure to seek and comply with treatment is not in any
16 way inconsistent with his bipolar diagnosis and resultant limitations. Moreover, despite limited
17 treatment since 2007, the record includes a documented visit to Plaintiff's treating psychiatrist in
18 January 2014, AR 364-73, an opinion letter from his treating psychiatrist in February 2015, AR
19 412, and a consultative examination and medical source statement in June 2015, AR 414-18, 420-
20 22. The ALJ did not suggest that this record was too sparse to adequately determine Plaintiff's
21 RFC. Therefore, neither the shortage of post-2007 medical records nor Plaintiff's reluctance to
22 seek treatment are persuasive, specific, or valid reasons for giving the VA's determination of
23 disability little weight.

24 **D. Little Weight Given To Treating Physicians**

25 Plaintiff argues that the ALJ erred in giving little weight to the opinion letter prepared by
26 Plaintiff's treating psychiatrist, Claudia Taccir-Macias, M.D. The ALJ found that Dr. Taccir-
27 Macias's letter was conclusory, unsupported by the record, and failed to address the effects of
28 Plaintiff's poor compliance on his overall mental condition. AR 16.

1 When reviewing the weight assigned to various physicians' opinions and conflicts between
2 opinions, the Ninth Circuit distinguishes the opinions of three types of physicians: (1) treating
3 physicians; (2) examining physicians; (3) neither treating nor examining physicians. Lester v.
4 Chater, 81 F.3d 821, 830 (9th Cir. 1995). The treating physician's opinion is generally entitled to
5 more weight. Id. If a treating physician's opinion or ultimate conclusion is not contradicted by
6 another physician, "it may be rejected only for 'clear and convincing' reasons." Id. However,
7 when the treating physician's opinion is contradicted by another physician, the Commissioner may
8 reject it by "providing 'specific and legitimate reasons' supported by substantial evidence in the
9 record for so doing." Id. A treating physician's opinion is still owed deference if contradicted and
10 is often "entitled to the greatest weight . . . even when it does not meet the test for controlling
11 weight." Orn v. Astrue, 495 F.3d 625, 633 (9th Cir. 2007). Because a treating physician has the
12 greatest opportunity to observe and know the claimant as an individual, the ALJ should rely on the
13 treating physician's opinion. Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983).

14 Dr. Taccir-Macias's letter is brief, but it is not conclusory; she supports her conclusion that
15 Plaintiff is unable to engage in gainful activity with her observations that his bipolar disorder
16 affects his concentration, ability to relate to others, ability to sleep or eat properly, and overall
17 ability to function. AR 412. These observations and conclusions are consistent with her treatment
18 notes from January 2014, which record Plaintiff's severe sleep difficulties, irritated affect,
19 overwhelming psychosocial problems, self-reported inability to complete tasks, and overall GAF
20 score of 45. AR 364–70. They are also consistent with the June 2015 consultative examination,
21 which notes Plaintiff's high borderline range concentration, his history of poor workplace
22 relationships, his poor sleep schedule and appetite, and an overall poor prognosis. AR 414–18.
23 To the extent Dr. Taccir-Macias's letter is inconsistent with the 2015 consultative examination or
24 any other medical records from non-treating sources, the ALJ nevertheless must credit Dr. Taccir-
25 Macias's opinion absent specific and legitimate reasons supported by substantial evidence in the
26 record, which the ALJ did not provide. Lastly, the ALJ did not explain why Dr. Taccir-Macias
27 would need to address Plaintiff's poor compliance in her opinion letter in order to be credible,
28

1 particularly considering a lack of evidence or findings that Plaintiff's mental condition would
2 improve with additional treatment.

3 **E. Remand**

4 The ALJ's decision is not supported by substantial evidence. Because the ALJ failed to
5 make findings supported by the medical record regarding Plaintiff's RFC in 2007, the ALJ failed
6 to make a meaningful determination of medical improvement. The ALJ came to improper
7 conclusions regarding Plaintiff's failure to seek continued mental health treatment and improperly
8 discredited the VA's disability determination and the treating psychiatrist's opinion.

9 Plaintiff is continually entitled to his disability benefits awarded in 2007 absent a
10 substantial showing of medical improvement in accordance with the eight-step process set forth at
11 20 C.F.R. § 404.1594. See 42 U.S.C. 423(f). Because the Commissioner has not met its burden,
12 this case is remanded for a reinstatement of benefits.

13
14 **V. CONCLUSION**

15 **IT IS HEREBY ORDERED** that this matter is remanded to Defendant Nancy A.
16 Berryhill, Acting Commissioner of Social Security, for a reinstatement of benefits.

17 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter a final judgment in
18 favor of Plaintiff, and against Defendant. The Clerk of Court is instructed to close the case.

19
20 **DATED** this 27th day of October, 2018.

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23 **RICHARD F. BOULWARE, II**
24 **UNITED STATES DISTRICT JUDGE**